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IN THE UNITED STATES DISTRICT COURT

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9
FOR THE NORTHERN DISTRICT OF CALIFORNIA

10
11 NICK MAKREAS,

No. C-11-2406 MMC

12 Plaintiff,

13 v.

14 THE MOORE LAW GROUP, A.P.C., et al.,

15 Defendants.

**16 ORDER GRANTING IN PART AND
DENYING IN PART MOORE LAW
GROUP'S MOTION TO DISMISS;
GRANTING CITIBANK'S MOTION TO
DISMISS; AFFORDING PLAINTIFF
LEAVE TO AMEND FOR LIMITED
PURPOSE; CONTINUING CASE
MANAGEMENT CONFERENCE**

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18 Before the Court are two motions to dismiss, filed pursuant to Rule 12(b)(6) of the
19 Federal Rules of Civil Procedure: (1) defendant The Moore Law Group, A.P.C.'s ("Moore")
20 motion, filed November 21, 2011; and (2) defendant Citibank (South Dakota), N.A.'s
21 ("Citibank") motion, filed November 14, 2011. Plaintiff Nick Makreas ("Makreas"), who
22 proceeds pro se, has filed opposition to each motion, and each defendant has filed a reply.
23 Additionally, Makreas has filed a "reply" to Moore's reply. Further, with leave of court,
24 Moore and Makreas have filed supplemental briefing to address a jurisdictional issue.
25 Having read and considered the papers filed in support of and in opposition to the motions,
26 the Court rules as follows.¹

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1By order filed January 31, 2012, the Court took the motions under submission.

LEGAL STANDARD

2 Dismissal under Rule 12(b)(6) can be based on the lack of a cognizable legal theory
3 or the absence of sufficient facts alleged under a cognizable legal theory. See Balistreri v.
4 Pacifica Police Dep’t, 901 F.2d 696, 699 (9th Cir. 1990). Rule 8(a)(2), however, “requires
5 only ‘a short and plain statement of the claim showing that the pleader is entitled to relief.’”
6 See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Fed. R. Civ. P.
7 8(a)(2)). Consequently, “a complaint attacked by a Rule 12(b)(6) motion to dismiss does
8 not need detailed factual allegations.” See id. Nonetheless, “a plaintiff’s obligation to
9 provide the grounds of his entitlement to relief requires more than labels and conclusions,
10 and a formulaic recitation of the elements of a cause of action will not do.” See id. (internal
11 quotation, citation, and alteration omitted).

In analyzing a motion to dismiss, a district court must accept as true all material allegations in the complaint, and construe them in the light most favorable to the nonmoving party. See NL Industries, Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). “To survive a motion to dismiss, a complaint must contain sufficient factual material, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at 570). “Factual allegations must be enough to raise a right to relief above the speculative level[.]” Twombly, 550 U.S. at 555. Courts “are not bound to accept as true a legal conclusion couched as a factual allegation.” See Iqbal, 129 S. Ct. at 1950 (internal quotation and citation omitted).

21 Generally, a district court, in ruling on a Rule 12(b)(6) motion, may not consider any
22 material beyond the complaint. See Hal Roach Studios, Inc. v. Richard Feiner & Co., 896
23 F.2d 1542, 1555 n. 19 (9th Cir. 1990). Documents whose contents are alleged in the
24 complaint, and whose authenticity no party questions, but which are not physically attached
25 to the pleading, however, may be considered. See Branch v. Tunnell, 14 F.3d 449, 454
26 (9th Cir. 1994).

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DISCUSSION

A. Moore's Motion to Dismiss

1. Subject Matter Jurisdiction

4 At the outset, the Court addresses Moore’s argument, first made in its reply and
5 subsequently addressed in its supplemental briefing, that the Court lacks subject matter
6 jurisdiction over Makreas’s claims against Moore. Specifically, Moore argues that a case or
7 controversy no longer exists for the reason that Makreas failed to accept Moore’s offer of
8 judgment, made pursuant to Rule 68 of the Federal Rules of Civil Procedure, the terms of
9 which offer, according to Moore, would have provided Makreas with the full amount he
10 could recover in the instant action.

11 Where a defendant offers to have judgment entered in an amount equal to or
12 greater than the maximum recovery the plaintiff could obtain, and the plaintiff does not
13 accept the offer, a case or controversy no longer exists, and the plaintiff's claims are
14 subject to dismissal. See, e.g., Marschall v. Recovery Solution Specialists, Inc., 399 Fed.
15 Appx. 186, 187 (9th Cir. 2010) (holding "district court properly dismissed [plaintiff's] claims
16 against [defendant] for lack of subject matter jurisdiction because [defendant's] offer of
17 judgment was for more than [plaintiff] was legally entitled to recover"); Zimmerman v. Bell,
18 800 F.2d 386, 388, 390 (4th Cir. 1986) (affirming dismissal of claim, where plaintiff rejected
19 offer of judgment in "maximum amount of damages claimed by [plaintiff]" plus costs;
20 holding, based on such offer, "there was no longer any case or controversy").

21 Here, it is undisputed that, at the time the instant action proceeded on Makreas's
22 initial complaint, Moore served on Makreas a written offer to have judgment entered under
23 specified terms. (See Moore Supp. Decl. ¶¶ 2, 3, Ex. A; Supp. Makreas Decl. ¶ 3.) Under
24 the terms thereof, Moore offered to pay Makreas the total sum of \$2250, which sum Moore
25 allocated as follows: (1) \$1000 for Makreas's claim under the Fair Debt Collection Practice
26 Act ("FDCPA"), (2) \$1000 for Makreas's claim under the Rosenthal Act, and (3) \$250 for
27 costs of suit. The offer did not allocate any sum for the two other claims in the initial
28 complaint, specifically, Makreas's claims under the Fair Credit Reporting Act ("FCRA") and

1 under § 17200 of the California Business & Professions Code. It is undisputed that
 2 Makreas did not accept the Rule 68 offer in writing “within 14 days after being served”
 3 therewith. See Fed. R. Civ. P. 68(a); (see also Moore Supp. Decl. ¶¶ 6-7; Supp. Makreas
 4 Decl. ¶ 5).

5 The Court agrees with Moore that \$1000 is the maximum recovery Makreas could
 6 obtain on his FDCPA claim, see 15 U.S.C. § 1692k(a)(2)(A) (providing for \$1000 maximum
 7 amount of statutory damages “in the case of any [FDCPA] action by an individual”), and
 8 that the maximum recovery Makreas could obtain on his Rosenthal Act claim likewise is
 9 \$1000, see Cal. Civil Code § 1788.30(b) (providing “debt collector” who “willfully and
 10 knowingly” violates Rosenthal Act is liable to debtor for “a penalty” of not more than
 11 \$1000); Marseglia v. JP Morgan Chase Bank, 750 F. Supp. 2d 1771, 1180 (holding
 12 “statutory damages under the Rosenthal Act are limited to \$1,000 per plaintiff, not per
 13 violation”; collecting cases).² Nonetheless, and even assuming the maximum recovery
 14 Makreas could obtain on his FCRA and § 17200 claims was, at the time the offer was
 15 made, zero,³ Moore’s offer was not equal to or in excess of the maximum amount Makreas
 16 could recover herein, because the offer conditioned entry of judgment on Makreas’s
 17 obtaining less than a full recovery of his costs. See, e.g., Edge v. C. Tech Collections, Inc.,
 18 203 F.R.D. 85, 88 (E. D. N.Y. 2001) (holding offer of judgment that “caps the costs”
 19 recoverable is not offer for “maximum amount” plaintiff could obtain); compare Rand v.
 20 Monsanto Co., 926 F.2d 596, 597-98 (7th Cir. 1991) (holding district court properly

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 22 ²Although both the FDCPA and the Rosenthal Act provide for recovery of actual
 23 damages, neither Makreas’s initial complaint nor any of his amended complaints has
 24 alleged any facts to support a finding he incurred actual damages by reason of Moore’s
 25 alleged FDCPA and Rosenthal Act violations. Rather, the facts Makreas has alleged
 26 pertaining to actual damages concern his claim that Moore violated the FCRA. (See, e.g.,
 27 Compl., filed May 17, 2011, at ¶¶ 37, 53-55, 71.)

28 ³At the time the offer was made, the Court had not yet addressed the adequacy of
 29 any of Makreas’s claims. By order filed October 11, 2011, Makreas’s FCRA claim was
 30 dismissed without leave to amend, and Makreas’s § 17200 claim was dismissed with leave
 31 to amend. Although Makreas subsequently amended his § 17200 claim, said claim, for the
 32 reasons discussed below, will be dismissed without further leave to amend. Accordingly, at
 33 the present time, the maximum recovery Makreas could potentially obtain on his FCRA and
 34 § 17200 claims is zero.

1 dismissed plaintiff's claims for lack of subject matter jurisdiction, where plaintiff did not
2 accept offer for "the full amount" plaintiff sought to recover on his claims "plus the costs of
3 the suit") (emphasis added). Specifically, the record indicates that at the time the offer was
4 made Makreas's recoverable costs were at least \$425;⁴ as noted, however, Moore's offer
5 limited Makreas's costs to a total amount of \$250.

6 Accordingly, the Court finds that a case or controversy presently exists between
7 Makreas and Moore.

2. Failure to State a Claim

9 Moore argues the SAC is subject to dismissal in its entirety for failure to state a
10 claim. The Court considers each cause of action in turn.

a. First Cause of Action

12 In the First Cause of Action, Makreas alleges Moore violated 15 U.S.C. § 1692e(11),
13 a section of the FDCPA that prohibits “any false, deceptive, or misleading representation or
14 means in connection with the collection of any debt.” See 15 U.S.C. § 1692e. Prohibited
15 representations and means include “[the failure to disclose in the initial written
16 communication with the consumer and, in addition, if the initial communication with the
17 consumer is oral, in that initial oral communication, that the debt collector is attempting to
18 collect a debt and that any information obtained will be used for that purpose, and the
19 failure to disclose in subsequent communications that the communication is from a debt
20 collector” See 15 U.S.C. § 1692e(11). A “communication,” for purposes of the
21 FDCPA, is “the conveying of information regarding a debt directly or indirectly to any
22 person through any medium.” See 15 U.S.C. § 1692a(2).

23 Makreas alleges he received thirteen “voice mail messages” from Moore, the first of
24 which was left on April 7, 2011 and the last of which was left on May 4, 2011. (See SAC
25 ¶ 42.) According to Makreas, the caller in each such message, “Andrea,” whose last name

27 ⁴The docket reflects that Makreas paid a \$350 filing fee (see Document No. 1), and
28 was charged \$75 to cause the summons and complaint to be served on Moore (see
Document No. 8).

1 was “unintelligible” (see SAC ¶ 42), “asked that a return call be given to Moore” (see SAC
 2 ¶ 35). Makreas alleges the voice messages violated the FDCPA because, according to
 3 Makreas, they did not include the disclosures required by § 1692e(11).

4 By order filed October 11, 2011, the Court denied Moore’s motion to dismiss
 5 Makreas’s § 1692e(11) claim as alleged in the First Amended Complaint (“FAC”), to the
 6 extent it was based on voice messages left after Makreas had received a letter from Moore
 7 stating that Makreas owed Citibank a debt; Makreas had alleged he received said letter on
 8 April 13, 2011. In particular, the Court found that “subsequent voice messages from Moore
 9 requesting that Makreas phone Moore could, arguably, be understood as indirectly
 10 conveying information about the debt to which Moore had referred in its letter.” (See Order,
 11 October 11, 2011, at 5:4-10.) With respect to voice messages left before Makreas received
 12 Moore’s letter, however, the Court dismissed the claim because Makreas had failed to
 13 allege sufficient facts to support a finding such messages constituted “communications” as
 14 defined by § 1692a(2). In particular, the Court noted the FAC included no facts to support
 15 a finding that, prior to his receiving the above-referenced letter, Makreas “would have had
 16 any reason to know Moore was contacting him about a debt,” (see id. at 5:11-15), and
 17 afforded Makreas leave to amend the claim.

18 In the SAC, Makreas has included the additional allegation that, prior to April 7,
 19 2011, the date of the first voice message, he was “familiar with Moore . . . as a debt
 20 collector” based on Moore’s involvement in a lawsuit against him involving collection of a
 21 debt. (See SAC ¶ 36.) Specifically, Makreas alleges, in January 2011, Moore, on
 22 Citibank’s behalf, filed in state court a complaint against Makreas that involved an
 23 “unrelated” Citibank “debt.” (See SAC ¶ 36.)

24 In the instant motion, Moore argues that Makreas’s new allegations fail to support a
 25 finding that voice messages made before Makreas received the above-referenced letter
 26 from Moore could constitute “communications.” According to Moore, “[any calls by [Moore]
 27 to [Makreas] subsequent to filing any state court action on behalf of a client creditor could
 28 and would be related to such litigation and court matters and have nothing to do with

1 collection of a debt." (See Def.'s Mot. at 14:8-12.) Moore further argues, with respect to
 2 each voice message including those made after Makreas received the above-referenced
 3 letter, Makreas has failed to allege any facts to support a finding that the messages are
 4 "communications" because Makreas "has no idea what any one of the calls regarded."
 5 (See id. at 14:18-28.) The Court is not persuaded.

6 First, the Court reiterates its prior finding that, as to voice messages made after
 7 Makreas received Moore's letter, the Court cannot conclude at the pleading stage that
 8 Makreas is unable to establish such messages were "communications" for purposes of the
 9 FDCPA. See Foti v. NCO Financial Systems, Inc., 424 F. Supp. 2d 643, 648, 658 (S.D.
 10 N.Y. 2006) (finding voice message was "communication," where message stated it was
 11 from "NCO Financial Systems" about "a personal business matter" and requested recipient
 12 return call; holding message "indirectly convey[ed] information about [a] debt" because
 13 listener was "familiar with the fact that NCO Financial Systems is a debt collector").

14 Second, the Court finds, as to voice messages left before Makreas received
 15 Moore's letter, Makreas has cured the deficiency identified in the Court's prior order,
 16 specifically, that Makreas was aware Moore was a debt collector. As the Supreme Court
 17 has held, an attorney who regularly attempts to collect debts through litigation is a "debt
 18 collector" for purposes of the FDCPA. See Heinz v. Jenkins, 514 U.S. 291, 292, 295
 19 (1995) (rejecting argument that FDCPA "contain[s] an implied exemption for those debt-
 20 collecting activities of lawyers that consist of litigating," such as "settlement efforts"). Voice
 21 messages from Moore left during the course of a lawsuit to collect a debt could be
 22 understood as "indirectly convey[ing]" information about the debt Makreas knew to be at
 23 issue in that lawsuit. See Foti, 424 F. Supp. 2d at 658. Consequently, even if, as Moore
 24 argues, any voice message it left in fact only concerned the conduct of the lawsuit, such as
 25 matters of a procedural nature, the Court cannot so find at the pleading stage, nor find that
 26 Makreas is unable to establish any such message was a "communication" for purposes of
 27 the FDCPA.

28 Consequently, Moore has failed to show the First Cause of Action is subject to

1 dismissal to the extent it is based on a violation of § 1692e(11).⁵

2 The First Cause of Action also includes, however, a claim that Moore violated 15
 3 U.S.C. § 1692g(a), another section of the FDCPA. (See SAC ¶¶ 35, 39.) As Moore
 4 correctly points out, the Court, in its order of October 11, 2011, dismissed Makreas's
 5 § 1692g(a) claim without leave to amend.

6 Accordingly, Moore's motion to dismiss the First Cause of Action will be granted to
 7 the extent the First Cause of Action is based on a violation of § 1692g(a), said claim
 8 previously having been dismissed without leave to amend, and in all other respects will be
 9 denied.

10 **2. Second Cause of Action**

11 In the Second Cause of Action, Makreas alleges Moore violated a section of the
 12 Rosenthal Act, specifically, California Civil Code § 1788.17. Section 1788.17 provides that,
 13 as a matter of California law, a debt collector must comply with 15 U.S.C. §§ 1692b -
 14 1692j, which sections constitute the substantive provisions of the FDCPA. See Cal. Civil
 15 Code § 1788.17.

16 The Second Cause of Action is, in part, derivative of the First Cause of Action. (See
 17 SAC ¶ 53.) For the reasons stated above with respect to the First Cause of Action, the
 18 Court finds Makreas has sufficiently alleged that Moore, through its employee "Adriana,"
 19 violated § 1692e(11). Moore argues, however, that because the definition of a "debt
 20 collector" under the Rosenthal Act excludes "an attorney or counselor at law," see Cal. Civil
 21 Code § 1788.2(c), Moore, a law firm, cannot be held liable under the Rosenthal Act. In
 22 support of this argument, Moore relies on two decisions, which, according to Moore, hold
 23

24 ⁵In its motion, Moore cites Pressley v. Capital Credit & Collection Service, Inc., 760
 25 F.2d 922 (9th Cir. 1985), in which the Ninth Circuit held that a "follow up notice which only
 26 demands payment as earlier requested" is not a "communication" for purposes of the
 27 FDCPA, see id. at 925; Moore argues therein, without explanation, that its voice messages
 28 were follow up notices. In its reply, Moore asserts it contacted Makreas in writing about a
 debt or debts, and argues its voice messages were attempts to leave a follow up notice of
 the type described in Pressley. Because Moore's argument is based on matters outside
 the pleadings, the Court does not consider such argument at the present stage of the
 proceedings.

1 that a "law firm" defendant, as a matter of law, is not a "debt collector" for purposes of the
 2 Rosenthal Act. (See Def.'s Mot, filed November 21, 2011, at 16 (citing Owings v. Hunt &
 3 Henriques, 2010 WL 3489342, *2 (S.D. Cal. 2010); Carney v. Rotkin, Schmerin & McIntyre,
 4 206 Cal. App. 3d 1513, 1526 (1988).)

5 The cases on which Moore relies, however, are distinguishable from the instant
 6 case, at least at the pleading stage. Unlike the plaintiffs in the decisions on which Moore
 7 relies, Makreas does not allege that the employee who engaged in the assertedly unfair
 8 debt collection activity is an attorney. See Owings, 2010 WL 3489342 at *3 (claim based
 9 on false statement made by "partner at [law firm]"); Carey, 206 Cal. App. 3d at 1522 (claim
 10 based on false statement by "attorney"). Rather, the SAC is silent as to whether "Adriana
 11 (unintelligible last name)" (see SAC ¶ 42) is or is not an attorney. Consequently, the Court
 12 finds it premature to decide whether Moore is entitled to rely on the "attorney" exception set
 13 forth in the Rosenthal Act.⁶

14 Consequently, Moore has failed to show, at this stage of the proceedings, that the
 15 Second Cause of Action is subject to dismissal to the extent it is based on a violation of
 16 § 1692e(11).

17 The Second Cause of Action is also based, however, on a claim that Moore violated
 18 15 U.S.C. § 1692c(c) and § 1692g(b), and, in turn, the Rosenthal Act. (See SAC ¶ 58.) As
 19 Moore points out, the Court, in its order of October 11, 2011, dismissed without leave to
 20 amend Makreas's claims that Moore violated § 1692c(c) and § 1692g(b).

21 Accordingly, Moore's motion to dismiss the Second Cause of Action will be granted
 22 to the extent the Second Cause of Action is based on violations of § 1692c(c) and
 23 § 1692g(b), said claims previously having been dismissed without leave to amend, and in

24
 25 ⁶To the extent Owings can be read as holding that a law firm is entitled to the
 26 "attorney" exception irrespective of whether the caller is himself/herself an attorney, see
 27 Owings, 2010 WL 3489342 at *2, the Court notes that other district courts have found to
 28 the contrary. See, e.g., Reimann v. Brachfeld, 2010 WL 5141858, *3 (N.D. Cal. 2010)
 (holding "law firms are not shielded from liability under the Rosenthal Act"; declining to
 follow Owings). Without knowing more about the individual who allegedly made the calls
 to Makreas and the circumstances surrounding the calls, the Court is not in a position to
 decide such issue as a matter of law.

1 all other respects will be denied.

2 **3. Third Cause of Action**

3 In the Third Cause of Action, Makreas alleges Moore violated § 17200 of the
 4 California Business & Professions Code. As pleaded, the Third Cause of Action is
 5 derivative of the First and Second Causes of Action. (See SAC ¶¶ 52, 70-71.) As relief for
 6 such violation(s), Makreas seeks “restitution.” (See SAC ¶¶ 52, 80.)⁷

7 In its October 11, 2011 order, the Court dismissed Makreas’s § 17200 claim, as
 8 alleged in the FAC, for the reason Makreas had failed to allege any facts to support his
 9 entitlement to restitution. See Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th
 10 1134, 1144-45 (2003) (holding, order of restitution, for purposes of § 17200, is order
 11 “compelling a [§ 17200] defendant to return money obtained through an unfair business
 12 practice to those persons in interest from whom the property was taken, that is, to persons
 13 who had an ownership interest in the property”) (internal quotation and citation omitted).

14 Moore argues, and the Court agrees, that Makreas has failed to cure the deficiency
 15 identified in the Court’s prior order. Specifically, the SAC includes no facts from which it
 16 reasonably can be inferred that Moore has ever obtained money or property from Makreas.

17 Accordingly, and there being no indication that further leave to amend would allow
 18 Makreas to cure the deficiency, the Third Cause of Action, as alleged against Moore, will be
 19 dismissed without further leave to amend.

20 **B. Citibank’s Motion to Dismiss**

21 **1. Second Cause of Action⁸**

22 The Second Cause of Action alleges violations of the Rosenthal Act.

23 **a. Direct Liability**

24 Makreas alleges Citibank both communicated with him and attempted to collect a
 25 debt after he had contested the validity thereof. (See SAC ¶¶ 58.) According to Makreas,

26
 27 ⁷As discussed in the Court’s October 11, 2011 order, Makreas does not seek an
 injunction as a remedy for Moore’s alleged violation of § 1692e(11).

28 ⁸The First Cause of Action is not alleged as against Citibank.

1 such acts violated § 1692c(c) and § 1692g(b) of the FDCPA; as set forth above, the
 2 Rosenthal Act prohibits, as a matter of state law, violations of the FDCPA.

3 Pursuant to § 1692c(c), “[if a consumer notifies a debt collector in writing that the
 4 consumer refuses to pay a debt or that the consumer wishes the debt collector to cease
 5 further communication with the consumer, the debt collector shall not communicate further
 6 with the consumer.” See 15 U.S.C. § 1692c(c). Section 1692g(b) provides that if a
 7 consumer, within a specified amount of time, notifies the debt collector in writing that the
 8 debt is “disputed,” the debt collector “shall cease collection of the debt” until the debt
 9 collector “obtains verification of the debt.” See 15 U.S.C. § 1692g(b).

10 In its October 11, 2011 order, the Court dismissed Makreas’s claim under the
 11 Rosenthal Act to the extent it was based on alleged violations by Citibank of § 1692c(c) and
 12 § 1692g(b), for the reason that Makreas failed to allege any facts to support his conclusory
 13 assertions that Citibank violated either such section; the Court afforded Makreas leave to
 14 amend.

15 In its motion, Citibank argues Makreas has failed to cure the above-referenced
 16 deficiency. The Court agrees. First, Makreas again alleges no facts to support a finding
 17 that Citibank ever sent a “communication,” see 15 U.S.C. § 1692a(2), to Makreas;
 18 consequently, Makreas fails to state a claim that Citibank violated § 1692c(c). Second,
 19 Makreas pleads no facts to support a finding that Citibank itself engaged in debt collection
 20 activities of any type, let alone after he allegedly disputed the debt; consequently, Makreas
 21 fails to state a claim that Citibank violated § 1692g(b).

22 Accordingly, the Second Cause of Action is subject to dismissal, without further
 23 leave to amend, to the extent it is based on a claim Citibank violated § 1692c(c) and/or
 24 § 1692g(b).

25 **b. Vicarious Liability**

26 As set forth above, Makreas alleges Moore violated the Rosenthal Act by failing to
 27 comply with § 1692e(11). Makreas asserts that Citibank is vicariously liable for any
 28 violation of the Rosenthal Act by Moore. Specifically, Makreas alleges Citibank “[placed]

1 an “account” with Moore for “collection activity” (see SAC ¶ 28) and “authorized” Moore’s
 2 conduct (see SAC ¶ 60). In its motion, Citibank argues Makreas has failed to plead any
 3 facts to support a claim asserting Citibank’s liability for any violation by Moore.

4 Under California law, “a person can be held vicariously liable for the acts of his
 5 agents.” See Garcia v. W & W Community Development, Inc., 186 Cal. App. 4th 1038,
 6 1049 (2010) (citing cases). In order to establish an agency relationship exists, the plaintiff
 7 must establish “the person for whom the work is performed has the right to control the
 8 activities of the alleged agent.” See Fenton v. Freedman, 748 F.2d 1358, 1361-62 (9th Cir.
 9 1984) (applying California law; holding in claim for breach of fiduciary duty, plaintiffs failed
 10 to establish defendant was their “agent,” where defendant “acted independently of any
 11 client’s control in performing her services”; noting “only degree of control exercised by
 12 [plaintiffs] was to reject or accept [defendant’s] recommendations”); see also, e.g., Garcia,
 13 186 Cal. App. 4th at 1049 (holding “[o]ne who renders services for a specified recompense
 14 for a specified result, under the control of his principal as to the result of his work only, and
 15 not as to the means by which such result is accomplished[,] is an independent contractor”;
 16 further holding “[a]n independent contractor . . . is not an agent”) (internal quotation and
 17 citation omitted).

18 Here, Makreas alleges no facts to support a finding that an agency relationship
 19 exists or existed between Citibank and Moore. Specifically, Makreas alleges no facts to
 20 support a finding that Citibank, having entered into an agreement with Moore under which
 21 Moore would attempt to collect a debt assertedly owed by Makreas to Citibank, had the
 22 right to control the activities of Moore. See Fenton, 748 F.2d at 1361-62.

23 Accordingly, the Second Cause of Action is subject to dismissal to the extent it is
 24 based on a claim that Citibank is vicariously liable for Moore’s alleged violation of the
 25 Rosenthal Act by reason of a failure to comply with § 1692e(11).

26 Because it is not clear from the record that Makreas could not cure the deficiency
 27 identified, the Court will afford Makreas a further opportunity to amend. See AE v. County
 28 of Tulare, — F.3d —, 2012 WL 251918, *4 (9th Cir. 2012) (holding, where district court

1 dismisses claim for pleading deficiency, leave to amend should be afforded unless
 2 amendment would be futile).

3 **3. Third Cause of Action**

4 In the Third Cause of Action, Makreas alleges Citibank violated § 17200 of the
 5 California Business & Professions Code. As pleaded, the Third Cause of Action, as alleged
 6 against Citibank, is derivative of the Second Cause of Action (see SAC ¶ 70), and, as relief,
 7 Makreas seeks “restitution.” (See SAC ¶ 80.)

8 Because the Court has dismissed the Second Cause of Action, as alleged against
 9 Citibank, the Third Cause of Action, as alleged against Citibank, likewise is subject to
 10 dismissal. Although, as set forth above, Makreas will be afforded limited leave to amend
 11 his Second Cause of Action, the Court, in its October 11, 2011 order, dismissed the
 12 § 17200 claim as alleged against Citibank for the additional reason that Makreas had failed
 13 to allege any facts to support his entitlement to restitution. Citibank argues, and the Court
 14 agrees, that Makreas has failed to cure that deficiency. Specifically, the SAC includes no
 15 facts from which it reasonably can be inferred that Citibank has ever obtained any money
 16 or property from Makreas by reason of a violation of the Rosenthal Act.

17 Accordingly, and there being no indication that further leave to amend would result in
 18 Makreas’s pleading any facts to show his entitlement to restitution, the Third Cause of
 19 Action, as alleged against Citibank, will be dismissed without further leave to amend.

20 **CONCLUSION**

21 For the reasons stated above:

22 1. Moore’s motion to dismiss is hereby GRANTED in part and DENIED in part as
 23 follows:

24 a. To the extent the motion seeks dismissal of the First Cause of Action, the
 25 motion is (1) DENIED as to the claim Moore violated § 1692e(11), and (2) GRANTED in all
 26 other respects;

27 b. To the extent the motion seeks dismissal of the Second Cause of Action,
 28 the motion is (1) DENIED as to the claim Moore violated § 1692e(11), and (B) GRANTED

1 in all other respects.

2 c. To the extent the motion seeks dismissal of the Third Cause of Action, the
3 motion is GRANTED.

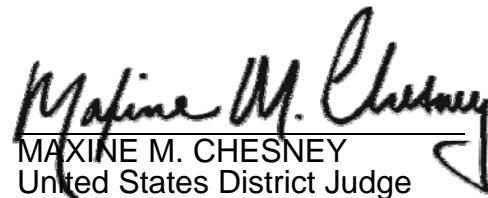
4 2. Citibank's motion to dismiss is hereby GRANTED.

5 3. All dismissed claims are hereby DISMISSED without further leave to amend, with
6 the exception that Makreas is afforded leave to amend the Second Cause of Action to the
7 extent it is brought against Citibank and is based on a theory that Citibank is vicariously
8 liable for any alleged violation of § 1692e(11) by Moore.⁹ If Makreas wishes to file an
9 amended complaint for such purpose, Makreas shall file a Third Amended Complaint no
10 later than February 24, 2012. If Makreas does not file a Third Amended Complaint on or
11 before February 24, 2012, the instant action will proceed on the claims remaining in the
12 Second Amended Complaint, specifically, the claims that Moore violated the FDCPA and
13 the Rosenthal Act by failing to comply with § 1692e(11).

14 4. The Case Management Conference is hereby CONTINUED from February 24,
15 2012 to April 27, 2012, at 10:30 a.m. A Joint Case Management Statement shall be filed
16 no later than April 20, 2012.

17 **IT IS SO ORDERED.**

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19 Dated: February 2, 2012


MAXINE M. CHESNEY
United States District Judge

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28 ⁹Makreas may not otherwise amend the Second Amended Complaint without first
obtaining leave of court. See Fed. R. Civ. P. 15(a)(2).